Ref: 600179-L01_21_9_21 Advice relating to SoFC

Confidential and Subject to Legal Privilege

9 September 2021

Mills Oakley
Level 7, 151 Clarence Street
Sydney NSW 2000

Dear Sirs,

RE: – Respondent's SOFC - Great River NSW Pty v Minister for Planning and Public Spaces.

I, James Davis of Enviroview Pty Ltd has been engaged to provide the services of a NSW EPA Contaminated Land Accredited Site Auditor, to conduct a Site Audit in accordance with the *Contaminated Land Management Act 1997* in relation to the land identified as the Nepean Business Park, Penrith NSW by Great River NSW Pty Ltd.

It is understood that Great River NSW Pty Ltd have made an appeal to the Land and Environment Court of a deemed refusal of a Development Application for the subdivision of the land that has been made with the Department of Planning, Industry and Environment.

The Minister for Planning and Public Spaces (the Respondent) has filed a Statement of Facts and Contentions. I have been asked to review several items in the Statement of Facts and Contentions and provide an opinion on the following points.

1. **Previous Site Audit** - I completed a Site Audit of a site that included the land referred to in the subdivision Development Application on 29 February 2016. The site audit was commissioned by the Penrith Lakes Development Corporation (PLDC) and was for the site described as the Southern Land Dedication Area of which the subject land was a part of. The Site Audit was not a requirement of a regulatory instrument, or other requirement under any legislation and was not a Statutory Site Audit within the meaning of the *Contaminated Land Management Act 1997*.

   A Site Audit Report was prepared and a Site Audit Statement issued at the conclusion of the Site Audit and that Statement certified that in my opinion the site was suitable for residential with accessible soil, including garden (minimal homegrown produce contributing less than 10% fruit and vegetable intake), excluding poultry; day care centre, preschool, primary school; residential with minimal opportunity for soil access, including units; secondary school; park, recreational open space, playing field; and

Commercial/industrial uses. A recommendation was provided as a comment on the Site Audit Statement that an unexpected finds protocol consistent with the objectives of such a protocol used at the time on the PLDC site be maintained in relation to the future management of excavation or earthworks at the site.

2. **Fill Importation under DA 86/2720** - Since the completion of that Site Audit, the site, which is designated to be the future Nepean Business Park and Great River Walk has been undergoing rehabilitation from the former extraction and tailings disposal activities, this requires the importation of suitable fill. The rehabilitation is being conducted in accordance with the conditions of development consent (DA 86/2720) and as modified, that requires that the fill material is classified as either Virgin Excavated Natural Material (VENM), as defined in the *Protection of the Environment Operations Act 1997* or subject to classification as Excavated Natural Material (ENM) in accordance with the various Resource Recovery Orders and Exemptions issued by the NSW EPA under the *Protection of the Environment Operations (Waste) Regulation 2014.*

3. **Current Site Audit and Fill Importation** - Great River NSW Pty Ltd have requested that a Site Audit be completed at the conclusion of the rehabilitation works to reconfirm that the site is suitable for the proposed use, from a contamination perspective. The scope of the current Site Audit includes the review of records of the fill materials imported under the approved consent being compiled by Great River NSW Pty Ltd and their environmental consultants engaged to undertake this task. As such, in the conduct of the Site Audit I review the fill importation records with the objective of being able to certify at the completion of those works that the site is suitable for proposed commercial/industrial use. The information that I have reviewed to date demonstrates that imported materials does meet the definition of VENM or ENM.

4. **Recommendation for an Unexpected Finds Protocol** - A recommendation was provided as a comment on the previous Site Audit Statement issued in 2016 that an unexpected finds protocol be maintained in relation to the future management of excavation or earthworks regarding asbestos.

   The requirement for such a protocol for asbestos has since by-and-large been supplanted by the NSW Code of Practice, Excavation Work published by the NSW Government in January 2020 and approved under section 274 of the *Work Health and Safety Act 2011*.

   It is recommended that the code of practice is accepted as the required standard for managing such a risk posed in the workplace from an unexpected find of asbestos where the site is subject to a Site Audit certifying that it is suitable for the proposed use. It should not require a specific condition of consent as is proposed in Part B3 item 1.1 of the Statement of Facts and Contentions as it is already an obligation under the existing WHS legislation, and such a requirement bears no relation to the requirements of SEPP 55 or the guidelines the SEPP. It is the view of this Site Auditor that either a site has been adequately assessed (as is the case here) or has not and SEPP 55 is clear on the requirements in that instance. Further, the NSW EPA guidelines

for consultants reporting on contaminated land do not include such a report, and there is some consistency between the reports required in the SEPP and the guidelines. It is not appropriate to require an unexpected finds protocol, either as a substitute for adequate assessment where this is not provided or where contamination was known to exist as an alternative for the Remedial Action Plan required by the SEPP.

5. **Fill Importation Protocol** – Having a clear and easy to follow fill importation protocol where fill is sourced from many separate source sites over an extended period is good practice where the classification of material is very specific due to the receiving site not being a licenced waste facility. There is an obligation on the receiving site to ensure that they are lawfully able to accept the fill material. The *Protection of the Environment Operations Act 1997* and associated waste regulations and resource recovery orders establish a highly integrated but unfortunately complicated regime for classification of surplus fill materials generated from various construction and infrastructure projects in the State for reuse as fill. Establishing a protocol that breaks down those requirements into an easy-to-follow process that creates consistency in the decisions made and whether to accept or reject a potential source of suitable fill and that creates the appropriate level of documentation of that process is good practice.

   Ideally requiring a specific protocol that forms a condition of consent where the development may take place over several years should be avoided, where legislation already exists. This can result in conditions not consistent with the changes in waste regulation and the application of waste exemptions, that can occur over relatively short periods as large fill-generating projects become active. Generally, a condition requiring the fill importation to be compliant with the applicable waste regulations and *Protection of the Environment Operations Act 1997* for importation onto an unlicensed site is appropriate to ensure that activities at the site remain consistent with the application and are consistent with the waste regulations. Such a condition is recommended to replace B3 item 1.3

Thank you for your time regarding this matter. If you require additional information or clarification, please do not hesitate to contact me.

Yours sincerely

James Davis
NSW EPA Contaminated Land Site Auditor
Enviroview Pty Ltd